NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIERRA CLUB, INC.; ALLIANCE FOR THE WILD ROCKIES,

Plaintiffs - Appellees,

v.

DEBORAH AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest,

Defendant,

and,

UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture,

Defendant - Appellee,

MINERAL COUNTY; TOWN OF SUPERIOR; ST. REGIS SCHOOL DISTRICT; SUPERIOR SCHOOL DISTRICT NO. 3; MONTANA COALITION OF FOREST COUNTIES; TRICON TIMBER, LLC,

Defendants-Intervenors - Appellants.

No. 03-35419

D.C. No. CV-03-00022-DWM

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

SIERRA CLUB, INC.; ALLIANCE FOR THE WILD ROCKIES, Plaintiffs - Appellees, v. DEBORAH AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture, Defendants - Appellants, and, MINERAL COUNTY; TOWN OF SUPERIOR; ST. REGIS SCHOOL DISTRICT; SUPERIOR SCHOOL DISTRICT NO. 3; MONTANA COALITION OF FOREST COUNTIES; TRICON TIMBER, LLC, Defendants-Intervenors.	No. 03-35537 D.C. No. CV-03-00022-DWM

SIERRA CLUB, INC.; ALLIANCE FOR THE WILD ROCKIES, Plaintiffs - Appellants, v. DEBORAH AUSTIN, in her official capacity	No. 03-35550 D.C. No. CV-03-00022-DWM

as Forest Supervisor for the Lolo National Forest,

Defendant,

and,

UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture,

Defendant - Appellee,

MINERAL COUNTY; TOWN OF SUPERIOR; ST. REGIS SCHOOL DISTRICT; SUPERIOR SCHOOL DISTRICT NO. 3; MONTANA COALITION OF FOREST COUNTIES; TRICON TIMBER, LLC,

Defendants-Intervenors - Appellees.

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted October 7, 2003
Seattle, Washington

Before: D.W. NELSON, KOZINSKI, and McKEOWN, Circuit Judges.

The National Environmental Protection Act (NEPA) requires the Forest Service to take a "hard look" at the environmental impact of a proposed major federal action. See 42 U.S.C. § 4332. The Forest Service's assessment of the Lolo

Post Burn Project's effect on water quality satisfied NEPA's requirements and was not arbitrary and capricious. The Environmental Impact Statement (EIS) included extensive discussion of the project's effects on water quality. The Forest Service analyzed the environmental impact of sedimentation estimates for each of the proposed alternatives, including the no-action alternative, in comparative form by using the water quality model LOLOSED. See 40 C.F.R. § 1502.14 (requiring the EIS to present the environmental impacts of proposed alternatives in comparative form). The Forest Service's analysis clearly indicates that the project's overall impact on water quality will be positive. Compared to the no-action alternative, the project will significantly reduce sedimentation in the affected streams after the first few years.

The Sierra Club's argument that the Forest Service was required to determine how much sediment the streams could assimilate before implementing the project is unpersuasive. NEPA is a procedural statute, not a substantive one. No substantive law requires such a determination and thus the district court's ruling that the Forest Service was required to await the completion of TMDLs (Total Maximum Daily Load) before implementing the Lolo Post Burn Project was without legal foundation and is therefore reversed. In turn, the injunction must be dissolved.

The Lolo Post Burn Project EIS was extensive and detailed in its presentation of the effects of logging on the Inventoried Roadless Areas (IRAs). Ultimately, no logging will occur in the IRAs. The IRAs must, however, be distinguished from the unroaded areas. Although the EIS takes care to define these distinct areas separately, it does not follow through in its analysis of the effects of logging on the unroaded areas. And, although the EIS was not completely silent as to the effects of logging on the unroaded areas, the cursory references do not satisfy the necessary "hard look" at the project's environmental impact that is required by NEPA.

The conclusion in the Record of Decision (ROD) that there would be no "irreversible and irretrievable commitment of the resource" because "no permanent road construction will occur in these areas" ignores the potential impact of logging. The decision does not assess the effects of logging but instead focuses solely on road construction. It is well established in this circuit that logging in an unroaded area is an "irreversible and irretrievable" commitment of resources that "could have serious environmental consequences." Smith v. U.S. Forest Service, 33 F.3d 1072, 1078 (9th Cir. 1994) (internal quotations and citations omitted).

The Forest Service failed to address the effects of logging in the unroaded areas on their characteristics vis-a-vis potential for future wilderness or IRA

designation. The decision to defer analysis until the Forest Plan revision is undertaken several years hence in 2006 essentially results in the effects analysis taking place after the action. In other words, the logging will occur first and the analysis will occur later. The choice to commence logging under the Lolo Post Burn Project implicates and constrains future decisions regarding the project areas. See California v. Block, 690 F.2d 753, 762-63 (9th Cir. 1982) (explaining that future evaluation of wilderness qualities is meaningless if the area will no longer be managed in a manner consistent with wilderness preservation by the time the evaluation occurs). For these reasons, "NEPA requires consideration of the potential impact of an action *before* the action takes place." Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998) (internal quotations and citations omitted).

In contrast to the EIS's thorough analysis of the project's potential effect on the IRAs, the discussion of the impact on unroaded areas was superficial and largely conclusory.[1] There was no analysis of the project's impact on the unique values of unroaded areas, which the Forest Service has previously acknowledged.

[1]The dissent clouds the analysis by conflating its discussion of the IRAs and the unroaded areas. Much of the analysis cited by the dissent focuses on IRAs rather than unroaded areas. See FEIS Ch. 3.10 (including several pages discussing IRAs but only a few paragraphs which specifically address unroaded areas).

See 65 Fed. Reg. 30276, 30281-83 (describing unique values of unroaded areas). Nor was there any analysis of the project's impact on the potential for the unroaded areas to be designated as IRAs or wilderness in the future. Additionally, the EIS did not reference the impact of logging on unroaded areas contiguous to IRAs. Simply disclosing the fact that the unique qualities of the unroaded areas may be diminished does not suffice. A conclusion with no analysis does not meet NEPA's standard. See Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998) (stating that "general statements about 'possible' effects . . . do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.") (quoting Neighbors of Cuddy Mountain, 137 F.3d at 1380). It can hardly be called nitpicking to require the barest minimum of analysis with respect to the characteristics of the unroaded areas.

For these reasons, the ROD and the underlying EIS did not satisfy the "hard look" requirement with respect to the environmental impact of logging on unroaded areas. The district court's summary judgment in favor of the Forest Service with respect to logging in the unroaded areas is reversed and remanded for proceedings consistent with this disposition.

REVERSED AND REMANDED. Each party shall pay its own costs on appeal.